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Nos. 02-722 and 02-733

Supreme Court, U.S.
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In The Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

HARRY LOW, in his capacity as Commissioner of Insurance for the State of California,
Respondent.

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, *et al.*,
Petitioners,

v.

HARRY LOW, in his capacity as Commissioner of Insurance for the State of California,
Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

I. THE U.S. BRIEF CONFIRMS THAT THE HVIRA POSES NO TANGIBLE THREAT TO U.S. FOREIGN AFFAIRS 1

II. THE U.S. BRIEF MISSTATES THE *BARCLAYS* CASE AND IMPLIES A SWEEPING RULE OF EXCLUSIVE FEDERAL AUTHORITY THAT IS UNSUPPORTED BY LAW 2

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) 2, 3, 4, 5

Clark v. Allen, 331 U.S. 503 (1947) 3

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 5

Hagen v. Utah, 510 U.S. 399 (1994) 1

Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903 (3rd Cir. 1990) 2, 4

Zschernig v. Miller, 389 U.S. 429 (1968) 3, 4, 5

FEDERAL STATUTES

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000) 3, 4

U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note) (2000) 4

STATE STATUTE

California Insurance Code Sections 13800-13807 ..... *passim*

OTHER AUTHORITIES

Supreme Court Rule 15.8 1

SUPPLEMENTAL BRIEF

Respondent Harry W. Low, in his capacity as the Commissioner of Insurance of the State of California (the "Commissioner") respectfully submits this supplemental brief in response to the Brief for the United States as Amicus Curiae Supporting Petitioners (Nos. 02-722 and 02-733) (the "U.S. Brief"). Supreme Court Rule 15.8. *See Hagen v. Utah*, 510 U.S. 399, 410 (1994).

I. THE U.S. BRIEF CONFIRMS THAT THE HVIRA POSES NO TANGIBLE THREAT TO U.S. FOREIGN AFFAIRS

Much of petitioners' argument is premised upon dramatic overstatement of the effect of California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 (the "HVIRA"), upon U.S. foreign affairs. As pointed out in the Commissioner's briefs in opposition, petitioners seek to manufacture a foreign policy crisis out of pure rhetoric, without a single concrete example of how the HVIRA has affected or may affect U.S. foreign affairs. The Commissioner has noted that all of the U.S. diplomatic initiatives mentioned by petitioners (the German Foundation Agreement, the International Commission on Holocaust Era Insurance Claims (ICHEIC) and various other related agreements) are proceeding without any disruption or material threat of disruption from the HVIRA. Brief in Opposition to the AIA Petition (No. 02-722) at 15-17.

The U.S. Brief confirms the HVIRA's lack of foreign policy effects. The U.S. Brief does not identify any tangible harm to foreign affairs that might be posed by the HVIRA (nor do the related amicus briefs of the governments of Switzerland and Germany). At most, the U.S. Brief offers

conclusory and speculative suggestions that the HVIRA "threatens to impair" United States policy, that it "may impede the implementation and operation" of various agreements, and that it is "potentially disruptive and counterproductive." U.S. Brief at 17-18. But the U.S. Brief fails to suggest any way in which the HVIRA has caused, or even may cause, any disruption to the ongoing Holocaust settlement initiatives or any material aspect of U.S. diplomacy.

The only matter beyond mere speculation that the U.S. Brief suggests is that Germany and Switzerland have lodged diplomatic protests against various state laws including the HVIRA. But it is not unusual for state laws affecting foreign private companies to be protested by those companies' home governments, and neither this Court nor any other court has held that such protests alone are constitutionally significant effects upon foreign affairs. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990).

II. THE U.S. BRIEF MISSTATES THE *BARCLAYS* CASE AND IMPLIES A SWEEPING RULE OF EXCLUSIVE FEDERAL AUTHORITY THAT IS UNSUPPORTED BY LAW

Recognizing that the HVIRA has not impaired any diplomatic initiative and does not criticize any foreign government, the U.S. Brief nonetheless suggests that the HVIRA impermissibly "intrudes" in some vague way short of actual interference into a sphere of exclusive federal authority. As the Commissioner discussed in his Brief in Opposition to the AIA Petition (No. 02-722) (pages 17-18),

under *Zschernig v. Miller*, 389 U.S. 429 (1968), a state intrudes upon the federal government's foreign affairs power if the state criticizes, insults or shows hostility toward a foreign government. But the HVIRA does not do any of these things. The HVIRA is not even directed to foreign governments – it is merely a regulation of the local, private business of insurance in California.

Moreover, state regulation of the business of insurance, even when it involves multinational actors, is not part of a sphere of federal exclusivity. Rather, insurance regulation has long been a usual state activity, as recognized by Congress in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000). As this Court has held, such a traditional state regulatory activity remains appropriate even if it has effects upon foreign private parties. *Barclays*, 512 U.S. at 328-30; *Clark v. Allen*, 331 U.S. 503 (1947). Indeed, the principal difference between *Clark* and *Zschernig* (cases that involved substantially similar statutes) was that the statute struck down in *Zschernig* was being applied in a way that criticized and insulted foreign governments, whereas the statute upheld in *Clark* adversely affected foreign private parties but was not implemented in a way that criticized foreign governments. *See Zschernig*, 389 U.S. at 433-34.

The U.S. Brief suggests that, even apart from *Zschernig*, the fact that U.S. diplomatic activity has occurred or is ongoing with respect to the resolution of Holocaust-era insurance claims is sufficient to oust state regulatory authority that touches in some respect on that subject matter. The U.S. Brief contains no authority for such a limitless claim of federal authority and there is none. No case has ever held that the existence of U.S. diplomatic efforts itself overrides state regulatory authority, and at

least two important cases are squarely to the contrary. In both *Barclays*, 512 U.S. 298 (1994), and *Trojan Technologies*, 916 F.2d 903 (3rd Cir. 1990), the Executive was involved in diplomatic activities relating to the state laws at issue and foreign governments had strongly protested the state activities. Yet the laws in both cases were upheld on the ground that no preemptive act of Congress (or applicable treaty) overrode the state's authority.[1] In any event, the United States has expressly acknowledged here that the German Foundation Agreement is not itself preemptive of laws such as the HVIRA. *See* Resp. App. at 48-49.

The U.S. Brief misstates the importance and effect of the *Barclays* case. The brief argues that the Court of Appeals below erred in relying on *Barclays*, because "*Barclays* addressed an unusual situation in which Congress and the Executive had taken divergent positions." U.S. Brief at 19. However, as the court below pointed out, the positions of the Executive and Congress are no less divergent in the present case. Based on a thorough review of the relevant congressional legislation,[2] the court below concluded that Congress had implicitly approved state

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[1] This Court granted certiorari in *Barclays* based on, *inter alia*, dormant Commerce Clause and *Zschernig* challenges to a state statute. This Court decided the case under the dormant Commerce Clause and upheld the statute without mentioning *Zschernig*, thus implicitly rejecting the *Zschernig* challenge. In *Trojan Technologies*, the Third Circuit specifically considered and rejected the *Zschernig* challenge.

[2] In particular, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 and the U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note) (2000).

laws such as the HVIRA. Congress plainly has not adopted any legislation opposing such state activities or otherwise indicated any concern about them. In *Barclays*, Congress had not adopted any legislation affirmatively supporting the challenged law; it had simply declined to adopt an Executive branch recommendation to enact legislation restricting the states. This Court held that it would not invalidate the state law, despite its effects on foreign businesses and protests by foreign governments, in the absence of "specific indications of congressional intent to bar the state statute here challenged." *Barclays*, 512 U.S. at 324.[3]

In sum, the U.S. Brief appears to rest upon the unsupported assertion of a sweeping Executive power to override legitimate state regulatory authority through past or current diplomatic activity. Such far-reaching authority would invalidate many state regulatory regimes whose constitutionality has never before been doubted. State regulatory authority, of course, is displaced by actions of Congress, which is the voice of the nation in foreign commerce, *see Barclays*, 512 U.S. at 329-330, and may not overstep the limits established in *Zschernig*, 389 U.S. 429, by criticizing or insulting foreign governments. But the HVIRA does not fall into either of these categories. Accordingly, it is no more constitutionally suspect than the state statute upheld in *Barclays*, which regulated private

[3] In contrast, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), upon which the U.S. Brief primarily relies, Congress had adopted legislation establishing a national policy that displaced the states. Thus, the "specific indications of congressional intent" from *Barclays* were plain and this Court accordingly invalidated the statute.

business, had been protested more vigorously by foreign governments, and had received less support from Congress than has the HVIRA.

Respectfully submitted,

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